



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JUNE 03, 2022

IN THE MATTER OF:

Appeal Board No. 620834

PRESENT: JUNE F. O'NEILL, MEMBER

In Appeal Board Nos. 620834 and 620835, the claimant appeals from the decisions of the Administrative Law Judge filed January 5, 2022, which sustained the initial determinations holding the claimant ineligible to receive benefits, effective March 23, 2020 through March 21, 2021, on the basis that the claimant was not totally unemployed; and charging the claimant with an overpayment of \$12,766 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4), \$13,200 in Federal Pandemic

Unemployment Compensation (FPUC) benefits recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, \$6,014.75 in Pandemic Emergency Unemployment Compensation (PEUC) benefits recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, and \$1,800 in Lost Wages Assistance (LWA) benefits recoverable pursuant to 44 CFR Sec. 206.120 (f)(5).

In Appeal Board No. 620836, an appeal by the claimant was processed to the Appeal Board from the decision of the Administrative Law Judge filed January 5, 2022, which overruled the initial determination reducing the claimant's right to receive future benefits by 304 effective days and charging a civil penalty of \$4,791.11 on the basis that the claimant made willful misrepresentations to obtain benefits.

At the combined telephone conference hearing before the Administrative Law Judge, all parties were

accorded a full opportunity to be heard and testimony was taken. There was an

appearance by the claimant.

In Appeal Board No. 620836, it now appears that the appeal was processed through inadvertence. Since the Judge's decision in 021-48783, regarding the issue of willful misrepresentation to obtain benefits, including civil monetary penalty, is not adverse to the appellant's interest, the appellant has no standing to appeal from that decision.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: Before and after March 16, 2020, the claimant worked as a home attendant for her mother. She worked 32 hours spread over seven days a week. In September 2020, her hours were increased to 37 hours per week at \$15 per hour. Her set schedule was five hours on each of the five weekdays and six hours on each Saturday and Sunday. The claimant worked this schedule in the 12 weeks running consecutively from the week ending January 3, 2021 through the week ending March 21, 2021.

The claimant filed an original claim for benefits effective March 16, 2020. For the 40 weeks in the period of March 23, 2020 through March 21, 2021, the claimant received \$12,766 in regular unemployment insurance benefits, \$13,200 in FPUC benefits, \$6,014.75 in PEUC benefits and \$1,800 in LWA benefits, totaling \$33,789.75.

OPINION: In 021-48783, the Judge's decision found that the claimant did not make a willful misrepresentation when she certified for benefits for each of the 40 weeks before us in the period of March 23, 2020 through March 21, 2021. There was no appeal from that portion of the decision by a party with standing to do so. Therefore, we are bound by that decision that she did make any willful misrepresentations when she certified for benefits for those weeks.

Pursuant to Labor Law 597 (3), absent fraud or willful misrepresentation, a determination may be reviewed only within one year from the date it was issued. The initial determinations in this case were first issued on October 25, 2021. As the claimant is deemed not to have made any willful misrepresentations, the Commissioner of Labor had no jurisdiction to redetermine the benefits received by the claimant prior to October 24, 2020. Moreover, as the claimant's certifications are not considered to be willful misrepresentations, we conclude that neither the forfeit penalty nor the

monetary penalty may be imposed.

As to the period beginning December 28, 2020 and ending January 17, 2021 (the weeks ending January 3, 2021; January 10, 2021 and January 17, 2021), the credible evidence establishes that the claimant was working seven days a week on a part-time basis. Only claimants who are totally unemployed are eligible to receive benefits. However, the initial determination states the claimant worked only three days in the week ending January 10, 2021 and two days in the week ending January 17, 2021; it does not state that she earned over \$504 in either week. As the claimant was not totally unemployed in the week ending January 3, 2021, she was ineligible to receive benefits for this week. As the claimant was not totally unemployed on three days in the week ending January 10, 2021 and on two days in the week ending January 17, 2021, she was ineligible to receive benefits for three days and two days, only, in those weeks.

With respect to the period beginning January 18, 2021, new rules were in effect to determine total unemployment. 12 NYCRR § 470.2(h), "Day of Total

Unemployment," effective January 18, 2021, provides:

1. For the purpose of calculating the number of effective days in a week to determine a claimant's weekly benefit entitlement in accordance with Labor Law § 590, a claimant shall experience a "day of total unemployment" or "full day

of total unemployment" on each day that is not a day of employment.

2. The total number of "day(s) of employment" in a week shall be calculated by adding the total number of hours worked in a week of employment, provided however that no hours in excess of ten are included per calendar day, dividing the total number of hours by ten, and rounding up to the nearest whole number. If the total number of hours worked in a week is equal to or less than four hours, no day of employment will have occurred. A claimant who works a total of 8 hours in a week shall be deemed to have engaged in one day of employment, and a claimant who works a total of 13 hours in a week shall

be deemed to have engaged in two days of employment, except that if the 13 hours occurred on one calendar day, such claimant shall be deemed to have engaged in one day of employment.

The claimant admittedly worked five hours on five days per week and six hours on two days per week. Applying the law for the period beginning January 18, 2021, we find that the claimant worked four days in each of the nine weeks beginning with the week ending January 24, 2021 and running through the week ending March 21, 2021. As the claimant was not totally unemployed in each of these nine weeks, she was ineligible to receive benefits for these weeks.

Accordingly, for these twelve weeks only, we conclude that the claimant lacked total unemployment in the week ending January 3, 2021 and in the weeks ending January 24, 2021 through March 21, 2021 and that she lacked total unemployment on three days in the week ending January 10, 2021 and on two days in the week ending January 17, 2021.

As the claimant was not totally unemployed during this period, she was overpaid the benefits she received in this period. Since regular unemployment insurance benefits are released to a claimant for the first 26 weeks, and since the period before us is the last twelve weeks in the 40 week period, the claimant did not receive regular unemployment insurance benefits in this period. All of the benefits that the claimant received for the week ending January 3, 2021 through the week ending March 21, 2021 were federal benefits. These benefits are recoverable pursuant to federal law. The amounts of the repayable overpayments are referred to the Department of Labor to be recalculated in accordance with this decision.

DECISION: In Appeal Board No. 620836, the appeal is dismissed.

The decision of the Administrative Law Judge in 021-48783 is continued in effect.

In Appeal Board Nos. 620834 and 620835, the decisions of the Administrative Law Judge are modified as follows and, as so modified, are affirmed.

In Appeal Board No. 620834, the initial determination, holding the claimant ineligible to receive benefits, effective March 23, 2020 through March 21, 2021, on the basis that the claimant was not totally unemployed, is modified to hold the claimant not totally unemployed for the week ending January 3, 2021 and in the weeks ending January 24, 2021 through March 21, 2021, for three days in the week ending January 10, 2021 and for two days in the week ending January 17, 2021, and, as so modified, is sustained.

In Appeal Board No. 620835, the initial determination, charging the claimant with an overpayment of \$12,766 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4), \$13,200 in Federal Pandemic

Unemployment Compensation (FPUC) benefits recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, \$6,014.75 in Pandemic Emergency Unemployment Compensation (PEUC) benefits recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, and \$1,800 in Lost Wages Assistance (LWA) benefits recoverable pursuant to 44 CFR Sec. 206.120 (f)(5), is modified in accordance with this decision, and, as so modified, is sustained.

The amounts of the recoverable overpayments are referred back to the Department of Labor for recalculation.

In Appeal Board Nos. 620834 and 620835, the claimant is denied benefits with respect to the issues decided herein.

JUNE F. O'NEILL, MEMBER